LIBRARY
SUPREME COURT. U.S.

Office - Supreme Court, U.S.
FILED
FEB 28 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 319

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 1

Constitutional provisions and statute involved 2

Questions presented for review 2

Statement of the case 4

Summary of argument 8

Argument 9

I.

Respondent did not meet the burden required of him in order to take away petitioner's United States citizenship 9

A.

In order to take away one's United States citizenship, the burden is upon the government to prove by clear, convincing and unequivocal evidence all the elements of expatriation 9

B.

On the ordinary burden of proof, even if petitioner had one here, his service in the Japanese army was involuntary 16

(1)

Military service by reason of conscription, creates a rebuttable presumption of involuntariness. Respondent did not overcome this presumption 16

(2)

Irrespective of the presumption, the courts below disregarded the principle that in matters involving loss of citizenship "the facts and the law should be construed as far as is reasonable in favor of the citizen." In so doing, their holdings that petitioner acted voluntarily is clearly erroneous 20

PAGE

II

8 U. S. C. 801(c) should not be construed to apply to the facts of this case 36

III

8 U. S. C. 801(c) is unconstitutional on its face and as applied 40

(1)

Preliminary statement 40

(2)

The right of expatriation is not to be equated with the penalty of expatriation 42

(3)

Congress has here exceeded its power 46

Conclusion 53

Appendix:

Extracts from and or comments on documents lodged with the clerk of this court, in aid of the court's taking judicial notice of conditions in Japan at the time involved in this case ..... App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Acheson v. Maeno, 202 F. 2d 458	7, 9, 17, 21, 23, 34
Acheson v. Murakami, 176 F. 2d 953	44
Adams v. Maryland, 347 U. S. 179	19
Aetna Ins. Co. v. Kennedy, 301 U. S. 389	46
Ainslee v. Martin, 9 Mass. 454	45
Alata v. Dulles, 221 F. 2d 52	17, 21
Amos v. United States, 255 U. S. 313	26, 46
Armstrong v. Alliance Trust Co., 126 F. 2d 164	7
Atchison, T. & S. F. R. Co. v. United States, 284 U. S. 248	23
Augello v. Dulles, 220 F. 2d 344	10, 11, 12, 17, 19, 21
Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274	6
Baumgartner v. United States, 322 U. S. 665	9, 20, 21, 29, 35
Becce v. Dulles, 226 F. 2d 265	17, 21
Bergan v. Badham (App. Dept., Cal. Superior Ct. of L. A. County, July, 1956, Los Angeles Daily Journal Reports, p. 12)	26
Bruni v. Dulles, 235 F. 2d 855	10, 12, 17
Bush, In re, 84 F. Supp. 873	23
Canevaro Case (1912)	38
Chesapeake & Ohio Ry. Co. v. Martin, 283 U. S. 209	30
Cudahy Packing Co. v. Holland, 315 U. S. 357	19
Daniels v. Tearney, 102 U. S. 415, 26 L. Ed. 187	6
Dawson's Lessee v. Godfrey, 4 Cranch (U. S.) 321	42
De Marco v. Dulles, 226 F. 2d 265	17, 21
DeWitt v. Wilcox, 301 F. 2d 787, cert. den. 332 U. S. 763	23
Doreau v. Marshall, 170 F. 2d 721	11
Dos Reis, ex rel. Camara v. Nicolls, 161 F. 2d 880	9, 31, 41
Fallo v. United States, 320 U. S. 549	7
Flynn ex rel. Yee Suey v. Ward, 104 F. 2d 980	30
Fong Wong Jung v. Dulles, 349 U. S. 941	4
Fukumoto v. Dulles, 210 F. 2d 553	5

PAGE

Galvan v. Press, 347 U. S. 522 52

Gibbs v. Burke, 337 U. S. 773 46

Gilson v. United States, 329 U. S. 338 18

Glasser v. United States, 315 U. S. 60 46

Gonzales v. Landon, 350 U. S. 920
..... 9, 10, 11, 12, 13, 15, 16, 20, 29, 35, 52

Grant, In re, 289 Fed. 814 44

Gualtieri v. Sperry Gyroscope Co., Inc., 67 F. Supp. 219 23

Hickman v. Taylor, 329 U. S. 495 30

Hirabayashi v. United States, 320 U. S. 81 ..... 7, 22

Hisamoto v. Dulles, No. 1318 47

Hodges v. Easton, 106 U. S. 408 46

Hunter v. Wade, 169 F. 2d 973, aff'd 336 U. S. 684, reh. den. 337 U. S. 921 23

Igarashi v. Dulles, No. 1240 47

Ishikawa v. Dulles, 85 F. Supp. 1 30

Johnson v. United States, 333 U. S. 10 ..... 26, 46

Johnson v. Zerbst, 304 U. S. 459 46

Kanno v. Acheson, 92 F. Supp. 183 ..... 5, 6, 22, 30

Kato v. Acheson, 94 F. Supp. 415 ..... 5, 6, 23, 30

Kawakita v. United States, 343 U. S. 717 ..... 19, 34, 36, 37, 44

Kikkawa v. Dulles, No. 1256 47

Lapides v. Clark, 176 F. 2d 619, cert. den. 338 U. S. 860, reh. den. 338 U. S. 888 40

Lehmann v. Acheson, 206 F. 2d 592
..... 10, 11, 12, 17, 19, 21, 25, 31, 34, 37

Mackenzie v. Hare, 239 U. S. 299 41

Mandoli v. Acheson, 344 U. S. 133
..... 9, 17, 18, 19, 24, 27, 28, 29, 30, 31, 34, 39

Maritime Union v. Herzog, 78 F. Supp. 146, aff'd 334 U. S. 854 22

Mendelsohn v. Dulles, 207 F. 2d 37 ..... 21, 34

PAGE

Milligan, Ex parte, 4 Wall. (U. S.) 2, 18 L. Ed. 281 22
Monaco v. Dulles, 210 F. 2d 769 ..... 9, 21, 25, 31
Morizumi v. Acheson, 101 F. Supp. 976 30
Moser v. United States, 341 U. S. 41 45
Murata v. Acheson, 99 F. Supp. 591 46
Murata v. Dulles, 111 F. Supp. 306 ..... 30, 47
Murray v. The Schooner Charming Betsy, 2 Cranch. (U. S.) 64 42
Namba v. Dulles, 134 F. Supp. 633 30
National Labor Relations Board v. E. C. Atkins Co., 331 U. S. 398 ..... 7, 22
Okada v. Dulles, 134 F. Supp. 183 30
Okimura v. Acheson, 99 Fed. Supp. 587 ..... 40, 46
Okimura v. Acheson, 111 F. Supp. 303 ..... 30, 37, 47
Ozasa v. Acheson, 94 F. Supp. 436 30
Pandolfo v. Acheson, 202 F. 2d 38 ..... 10, 11, 21, 26
Patton v. United States, 281 U. S. 276 46
Pedersen v. National Labor Relations Board, 234 F. 2d 417 19
Pence v. United States, 316 U. S. 332 30
Perkins v. Elg, 307 U. S. 325 ..... 9, 11, 45
Perri v. Dulles, 206 F. 2d 586 ..... 17, 19, 21
Podea v. Acheson, 179 F. 2d 306 ..... 9, 21, 34
Ponce v. Roman Catholic Church, 210 U. S. 296 23
Quinn v. United States, 349 U. S. 155 46
Quock Ting v. United States, 140 U. S. 417, 35 L. Ed. 501 33
Rice v. Olsen, 324 U. S. 786 46
Santi v. Dulles, 226 Fed. 266 17
Savage v. U. S. District Court, 144 F. 2d 575 7
Schioler v. Secretary of State, 175 F. 2d 402 10
Schneiderman v. United States, 320 U. S. 118 ..... 9, 20, 35
Serizawa v. Dulles, 134 F. Supp. 713 30
Shanks v. Dupont, 3 Pet. (U. S.) 242 42

	PAGE
Shibata v. Acheson, 86 F. Supp. 1	30
Skendzel v. Rose Manor Realty Co., 80 F. Supp. 619	23
Smith v. United States, 337 U. S. 137	46
Socolatov v. Dulles, 226 F. 2d 243	17, 21, 26
Sparrow v. Strong, 3 Wall. (U. S.) 97, 18 L. Ed. 49	6
Stamback v. Mc Hock Ke Lok Po, 336 U. S. 368	7, 22
Standard Oil Co. v. Johnson, 316 U. S. 481	7, 22
Stipa v. Dulles, 233 F. 2d 551	10, 11, 12, 21
Takegumia v. United States, 156 F. 2d 437	28, 30
Tamala v. Dulles, No. 1263	47
Tempel v. United States, 248 U. S. 121	7, 22
Terada v. Dulles, 121 F. Supp. 6	30, 47
The Appollon, 9 Wheat. (U. S.) 362, 6 L. Ed. 111	6, 22
The Pietra Campanella, 73 F. Supp. 18	23
Uesu v. Dulles, No. 1251	47
United States (Alexander Teflech) v. Austria and Hungary, United States v. P. I. O., 335 U. S. 106	36
Tripartitite Claims Commission, Decisions and Opinions (1920), p. 71	38
United States v. Di Re, 332 U. S. 581	26, 46
United States v. Eliasen, 11 F. 2d 785	26
United States v. Kusche, 56 F. Supp. 201	22
United States v. Kuwabara, 56 F. Supp. 716	44
United States v. Minker, 350 U. S. 179	12, 36
United States v. United States Gypsum Co., 333 U. S. 365	35
United States v. Wong Kim Ark, 169 U. S. 649	41, 42, 49
United States ex rel. Schachter v. Curran, 4 F. 2d 356	29
Urtego v. Pa., 335 U. S. 437	46
Weber v. United States, 315 U. S. 787	18, 21
Yasui v. United States, 320 U. S. 115	28
Yoshida v. Dulles, 116 F. Supp. 618	6, 30, 35
Zimmerman, Ex parte, 132 F. 2d 442, cert. den. 319 U. S. 744	23

Rules	Page
Rules of the United States Supreme Court, Rule 22(3)	1

Statutes	
California Code of Civil Procedure, Sec. 1847	30
Nationality Act of 1940, Sec. 401(c)	2, 3, 8, 12, 13, 27, 39
Nationality Act of 1940, Sec. 401(j)	3, 12, 13, 15
Revised Statutes, Sec. 1999	44
54 Statutes at Large, p. 1137	3
54 Statutes at Large, p. 1168	2
58 Statutes at Large, Chap. 368, Sec. 1, p. 677	44
58 Statutes at Large, p. 746	13
United States Code, Title 8, Sec. 801	49
United States Code, Title 8, Sec. 801(d)	47
United States Code, Title 8, Sec. 801(e)	46
United States Code, Title 8, Sec. 801(i)	39, 44
United States Code, Title 8, Sec. 801(j)	3, 13
United States Code, Title 8, Sec. 1254(a)(3)	2
United States Code, Title 8, Sec. 1481(a)(7)	44
United States Code, Title 8, Sec. 1483	44
United States Code (1946 Ed.), Title 8, Sec. 800	44, 45, 49
United States Code (1946 Ed.), Title 8, Sec. 801(c)	2, 4, 49
United States Code, Title 28, Sec. 1254(1)	1
United States Code, Title 28, Sec. 2101(c)	1
United States Constitution, Art. I, Sec. 1	50
United States Constitution, Art. I, Sec. 2, Subsec. 1	50
United States Constitution, Art. I, Sec. 2, Subsec. 4	50
United States Constitution, Art. I, Sec. 3, Subsec. 6	50
United States Constitution, Art. I, Sec. 3, Subsec. 7	50
United States Constitution, Art. I, Sec. 6, Subsec. 1	50
United States Constitution, Art. I, Sec. 8, Clause 4	40
United States Constitution, Art. II, Sec. 1, Subsec. 1	51
United States Constitution, Art. II, Sec. 2, Clause 1	51

PAGE

United States Constitution, Art. III, Sec. 1 ... 51

United States Constitution, Art. III, Sec. 3, Clause 1 ... 51

United States Constitution, Art. VI, Sec. 2 ... 41

United States Constitution, Art. VI, Sec. 3 ... 51

United States Constitution, Third Amendment ... 51

United States Constitution, Fifth Amendment ... 2, 4, 39, 40

United States Constitution, Fourteenth Amendment ... 4, 40, 41, 45, 49

United States Constitution, Fourteenth Amendment, Sec. 1 ... 2

United States Constitution, Seventeenth Amendment ... 52

TEXTBOOKS

35 American Bar Association Journal Institute, pp. 32, 33, Universal Declaration of Human Rights, Art. 15, (2) ... 39

11 American Law Reports, pp. 447, 474, Dutcher, The Right of Expatriation ... 43

1 Blackstone's Commentaries, p. 367 ... 44

California State Department Publication No. 1316, par. 29, p. 17 ... 28

31 Corpus Juris Secundum, Sec. 104, p. 711, note 79 ... 29

17 George Washington Law Review, pp. 427, 429, 431, Orfield, The Legal Effects of Dual Nationality ... 38

Getty's, The Law of Citizenship in the United States (Univ. of Chicago Press, 1934) p. 160 ... 43

41 Opinions Attorney General, No. 16 ... 18, 27, 39

Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1951 Ed.), p. 666 ... 18

29 Rocky Mountain Law Review, p. 62, Hurst, Can Congress Take Away Citizenship ... 42

Scott, Hague Court Reports (1916), p. 284 ... 38

25 Southern California Law Review, pp. 196, 199 ... 40

Swift, A System of the Laws of the State of Connecticut (Windham, Conn., 1795-96, Vol. I, p. 164) ... 43

IN THE

Supreme Court of the United States

October Term, 1956.

No. 415

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

Opinions Below.

No opinion was written by the trial court.

The opinion of the court below [R. 65-75] is reported at 235 F. 2d 135.

Jurisdiction.

This is a review of a judgment of the United States Court of Appeals for the Ninth Circuit in a civil case entered on June 18, 1956 [R. 76]. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). The petition was timely filed (Rule 22(3) of this Court; 28 U. S. C. 2101(6)) on September 13, 1956 [R. 77].

Constitutional Provisions and Statute Involved.

Section 401(c) of the Nationality Act of 1940 (54 Stat. 1168; 8 U. S. C. (1946 Ed.) 801(c)):

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> ". . . .
>
> "(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state";

Section 1 of the Fourteenth Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . ."

Fifth Amendment to the United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; . . ."

Questions Presented for Review.

1. Should Section 401(c) of the Nationality Act of 1940 (54 Stat. 1168; 8 U. S. C. 801(c))[1] be so interpreted as to impose compulsory loss if citizenship upon a native born United States citizen under the facts of this case—namely, obedience to the compulsory military conscription laws of Japan by a United States citizen temporarily residing in that country, he also, under the

---

[1]Now covered by 8 U. S. C. 1254(a)(3).

laws of that country having the nationality thereof, or should the statute, in order to avoid a grave constitutional question, be so interpreted as not to impose loss of citizenship on one who, while in a foreign country and subject to the laws thereof, obeys the laws of that country?

2. In expatriation cases arising under Section 401(c) of the Nationality Act of 1940, is the same standard of proof required as in denaturalization cases and as in cases arising under Section 401(j) (54 Stat. 1137; 8 U. S. C. 801(j))?

3. Upon whom is the burden of proving the nature of the conduct under Section 401(c)—the Government to show that the conduct was voluntary, or the citizen to show that the conduct was involuntary?

4. Where the military service referred to in Section 401(c) of the Nationality Act of 1940, is pursuant and in obedience to the compulsory military conscription law of the foreign country, does a rebuttable presumption arise that such service is involuntary?

5. Irrespective of where the burden of proof may lie in an expatriation case arising under Section 401(c) of the Nationality Act of 1940—whether that burden be upon the Government to show, by clear, convincing and unambiguous evidence, that the military service was voluntary, or it be upon the Government to overcome the presumption of involuntary conduct which arose by reason of the fact that petitioner's military service was pursuant to his being drafted under the compulsory Japanese Military Service Law, or whether it be upon petitioner to show that his service was involuntary—was petitioner's military service in Japan voluntary so that, constitutional and interpretation questions aside, he is to be held to have

lost his United States nationality in the light of the rule that in matters involving citizenship, the facts and the law are to be construed as far as is reasonable in favor of the citizen?

6. If the answers to the previous questions are such as to be against petitioner, is 8 U. S. C. 801(e) unconstitutional, on its face and as applied in this case, under the citizenship clause of the Fourteenth Amendment and/or under the due process clause of the Fifth Amendment?

Statement of the Case.

Petitioner was born in Artesia, California on April 20, 1916 [R. 10]. He was by United States law (Fourteenth Amendment) and by Japanese law [R. 34] a citizen of both countries by birth.[2] Until he went to Japan in August, 1939 [R. 18], petitioner lived all of his life in the United States and was educated in the schools in the United States. [R. 18]. In 1939 petitioner went to Japan in order to visit and study, intending to remain between two to five years [R. 26]. His mother and father remained in the United States [R. 29, 30]. He travelled on an American, not a Japanese passport [R. 39-40].[3]

When he got to Japan, petitioner started to study under a tutor in Japanese language [R. 35], he not being able to read Japanese characters [R. 29], but when his

---

[2]There is no evidence in the record as to the nationality law of Japan nor as to any of the facts necessary to make one a Japanese national under Japanese law.

[3]The trial court refused to admit the passport application, which showed on its face that Passport No. 44632, San Francisco Series, was issued to petitioner, into evidence [R. 41]. Under *Fong Wong Jung v. Dulles*, 349 U. S. 941, this was error.

father died in November, 1939 [R. 35], he had no funds and so had to go to work (*Ibid.*). Around June, 1940, pursuant to the Japanese compulsory military conscription law, [R. 22-23] he was required to take a physical examination [R. 18] and on March 1, 1941, pursuant to the same law, he was drafted into the army (*Ibid.*). Under the Japanese Military Service Law, service by petitioner was compulsory [R. 23] and said law provided for criminal punishment for evasion thereof (*Ibid.*).

When he received the notices to report for physical examination and to report for induction, he was afraid not to comply because he heard rumors that the Kempei Tei[4] would throw persons who tried to dodge the draft into prison [R. 37], or beat them [R. 47] and he even heard of one case of a boy who was bayoneted by them and killed [R. 37].

At the time here involved, the government of Japan was tyrannical and despotic, with the military controlling the country. Even high officials were killed in their homes [R. 37]. The police made monthly checks of the boarding house where petitioner lived [R. 44].[5]

The well known ruthlessness of the regime in power in Japan during this time is a matter of such general public history that this court can take judicial notice

---

[4]The Kempei Tei were the dreaded Japanese military police which held the people in Japan generally in fear. *See Kanno v. Acheson*, 92 F. Supp. 183, 184 (D. C. S. D. Cal., 1950); *Kato v. Acheson*, 94 F. Supp. 415, 416 (D. C. S. D. Cal., 1950). And *cf. Fukumoto v. Dulles*, 216 F. 2d 553, 555 (C. A. 9, 1955) and the Murayama deposition therein referred to.

[5]*Cf.* page 3, Murayama deposition in *Fukumoto v. Dulles*, 216 F. 2d 553, detailing the surveillance under which Nisei (first generation American-born persons of Japanese ancestry) were kept by the police.

thereof.[6] It was under these circumstances that petitioner obeyed the Japanese law.[7]

While in the army, petitioner was asked by non-commissioned officers, because he was born and raised in the United States, what he thought would be the outcome of the war [R. 38]. He replied that "there wouldn't be any chance of Japan winning the war at all." [R. 38.] For this indiscretion, he "was called up by the enlisted personnel of higher rank and . . . given a thorough beating." (*Ibid.*) After that he was beaten about every

---

[6] *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 516, 590, 591, 10 L. Ed. 274, 309; *Sparrow v. Strong*, 3 Wall. (U. S.) 97, 18 L. Ed. 49, 50; *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187, 188; *The Appollon*, 9 Wheat. (U. S.) 362, 374, 6 L. Ed. 111, 114.

For the purpose of aiding the Court in its judicial knowledge, we are lodging with the clerk of this Court, as was done in the court below, certain documents of the contents of which this Court can take judicial notice. These documents are:

1. "Education in the New Japan," published by Supreme Commander for the Allied Powers (SCAP), Civil Information and Education Section, Tokyo, 1948;

2. SCAP, Summation of Non-Military Activities in Japan and Korea, No. 3, December, 1945;

3. SCAP, Summation No. 1, September-October, 1945;

4. SCAP, Two Years of Occupation, Tokyo, 1947;

5. SCAP, A Brief Progress Report on the Political Reorientation of Japan, Tokyo, 1949;

6. Deposition of Kiyoshi Togosaki;

7. Deposition of Tamotsu Murayama;

8. Deposition of Hidemitsu Matsuki.

Some, or all, of these documents were introduced and received in evidence in numerous cases involving the issues of this case. *E.g. Kato v. Acheson*, 94 F. Supp. 415 (D. C. S. D. Cal., 1950); *Kanno v. Acheson*, 92 F. Supp. 183 (D. C. S. D. Cal., 1950); *Yoshida v. Dulles*, 116 F. Supp. 618 (D. C. D. Haw., 1954).

As to the official publications of SCAP (items 1 through 5), it is clear that this court may take judicial notice of their contents by reason of that fact alone. As to the depositions (items 6-8), they being part of the records of the district courts (and having been admitted into evidence usually without objection; the Mitsuki

day for a month and a couple days each month following (*Ibid.*). While he was in the army, his nickname was "America" (*Ibid.*). He was discharged at the end of the war [R. 19].

After the war, petitioner was denied a passport to return to the United States by the American Consulate at Yokohama on the ground that he had lost his United States citizenship by reason of his service in the Japanese Army [R. 12].

Hence this law suit.

The Government introduced no evidence [R. 49-50].

---

deposition, indeed, being taken by the Government) notice may be taken thereof as well." These principles are substantiated in the following cases:

N.L.R.B. v. F. C. Atkins Co., 331 U. S. 398, 406, where the Supreme Court took judicial notice of the contents of a circular issued by Headquarters, Army Service Forces. The court said:

> "Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it. *Standard Oil Co. v. Johnson*, 316 U. S. 481, 483, 484."

Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368, 375, where the court took judicial notice of a practice in the administrative office of the United States courts; *Trupel v. United States*, 248 U. S. 121, 126, where the court took judicial notice of the contents of reports of the Secretary of War. In *Standard Oil Co. v. Johnson*, 316 U. S. 481, 483, 484, the court took judicial notice of an order of Army Headquarters establishing post exchanges.

That this is the view of the Government is seen from its brief in *Hirabayashi v. United States*, 320 U. S. 81, where at page 11 it is said that "facts (appearing) in official documents . . . are peculiarly within the realm of judicial notice" citing innumerable cases.

See also as to the right to notice the facts revealed by the records of the District Courts: *Savage v. U. S. District Court*, 144 F. 2d 575 (C. C. A. 9, 1944); *Armstrong v. Alliance Trust Co.*, 126 F. 2d 164, 167 (C. C. A. 5, 1942). And compare *Falbo v. United States*, 320 U. S. 549, 553, fn. 7.

[7] *Cf. Acheson v. Maenza*, 202 F. 2d 453, 459 (C. D. D. C., 1953).

Summary of Argument.

There can be no expatriation from American citizenship unless the citizen acts voluntarily. In cases such as these the Government's burden is to show such conduct by evidence that is clear and convincing and not such as to leave the issue in doubt. Such evidence the Government did not produce here. Indeed, in this case, the Government introduced no evidence whatsoever.

At least, the Government's burden is to overcome the presumption that petitioner acted involuntarily. Since petitioner was drafted into the Japanese Army pursuant to law, carrying criminal penalties for violation thereof, the presumption is that his service was involuntary. Accordingly, judgment must be for the citizen since the government produced no evidence overcoming the presumption.

In any event, on the ordinary burden of proof, petitioner showed his service to have been involuntary. The trial court's holding to the contrary is clearly erroneous, it not having applied the principle that in matters involving the taking away of citizenship "the facts and the law should be construed as far as is reasonable in favor of the citizen."

Following accepted principles, the statute involved in this case should be so construed as to avoid a constitutional issue. Since petitioner had Japanese nationality, resided in Japan at the time and acted pursuant to the law of the country in which he was residing, Section 401(c) should not be construed to apply to this case to effect loss of citizenship.

If the statute is construed to apply to such facts, it is unconstitutional because Congress has no power to take away constitutionally endowed citizenship absent consent of the citizen with knowledge of the consequences and if Congress does so do, its action is arbitrary and a denial of due process.

ARGUMENT.

I.

Respondent Did Not Meet the Burden Required of Him in Order to Take Away Petitioner's United States Citizenship.

A.

In Order to Take Away One's United States Citizenship, the Burden Is Upon the Government to Prove by Clear, Convincing and Unequivocal Evidence All the Elements of Expatriation.

Certain principles are undisputed on the general question of expatriation from United States citizenship: there can be no expatriation unless there is a voluntary renunciation or abandonment of nationality; citizenship is a precious right that cannot be lightly taken away; ambiguous or equivocal conduct is not sufficient to cause loss of citizenship; United States citizenship is not to be taken away or deemed forfeited except in the clearest cases; the evidence in this regard must be clear, unequivocal and convincing, and not by a mere preponderance which leaves the issue in doubt. (*Cf. Perkins v. Elg*, 307 U. S. 325; *Gonzales v. Landon*, 350 U. S. 920; *Dos Reis, ex rel. Camara v. Nicolls*, 161 F. 2d 860 (C. C. A. 1, 1947); *Podea v. Acheson*, 179 F. 2d 306 (C. A. 2d, 1950); *Schneiderman v. United States*, 320 U. S. 118, 125; *Baumgartner v. United States*, 332 U. S. 665, 670; *Mandoli v. Acheson*, 344 U. S. 133, 193; *Acheson v. Maenza*, 202 F. 2d 453 (C. A. D. C., 1954); *Monaco v. Dulles*, 210 F. 2d 769 (C. A. 2, 1954).)

This means that the Government must show, and by the strict standard of proof required, not only that the citizen performed the physical acts denounced by the ex-

patriating statute,* but also, and by the same heavy degree of proof, that other all important element: that he did so voluntarily. It is the Government's burden, when it seeks the immense forfeiture it does here, to prove voluntary conduct, rather than the citizen's burden to prove involuntary conduct. (*Gonzales v. Landon*, 350 U. S. 920; *Anciello v. Dulles*, 220 F. 2d 344, 345 (C. A. 2, 1955); *Lehmann v. Acheson*, 206 F. 2d 592, 598 (C. A. 3, 1953); *Schioler v. Secretary of State*, 175 F. 2d 402, 403 (C. A. 7, 1949); *Stipa v. Dulles*, 233 F. 2d 551, 556 (C. A. 3, 1956); *Bruni v. Dulles*, 235 F. 2d 855, 856 (C. A. D. C., 1956).) That the Government followed the incorrect view of the law on this point is seen from the fact that it introduced not one shred of evidence in the case, thus obviously being content to rest on the theory that *petitioner* did not prove his case. That the trial court fell into the same error is seen from the fact that as soon as petitioner had rested, the court immediately asked Government counsel whether he rested [R. 49] to which an affirmative reply was made [R. 50]. That the Court below fell into the same error is seen from its express statement [R. 73]:

> ". . . the burden (is cast) upon the plaintiff to show that his entry into the armed forces was involuntary."

In so doing, the court below, while acknowledging [R. 71] "that the act of expatriation must be a voluntary act on the part of the plaintiff in order to effect an expatriation," and while approving language in *Pandolfo v. Ache-*

*Here, that he served in the armed forces of a foreign state and had the nationality of that state; two elements which are not in dispute.

son, 202 F. 2d 38, 40 (C. A. 2, 1953); that "the Government . . . had the burden of showing that he had expatriated himself," disregarded the fact that the voluntary aspect of the case is just as much a part of the Government's case as any other; for "the very essence of expatriation is that it be voluntary." *Dorean v. Marshall*, 170 F. 2d 721, 723 (C. A. 3, 1948). This is so because by its very definition "expatriation is the *voluntary* renunciation or abandonment of nationality and allegiance." *Perkins v. Elg*, 307 U. S. 325, 334. (Italics added.) If there can be no expatriation *unless* the act is voluntary, and if the Government has the burden of proving expatriation, the Government must, perforce, prove that the act is voluntary, and by the same heavy quantum of proof as any other element, for without such proof, there is no expatriation.

Prior to this Court's decision in *Gonzales v. Landon*, 350 U. S. 920,[9] the Court of Appeals for the Third Circuit had said (*Lehmann v. Acheson*, 206 F. 2d 592, 598):

> "It was the District Court's view that Lehmann bore the burden of establishing that his service in the Swiss Army and his taking of an oath of allegiance to Switzerland were involuntary. In that respect the District Court erred. . . ."[10]

---

[9] "The Court is of the view that the standard of proof required in denaturalization cases (see Schneiderman v. United States, 320 U. S. 118; Baumgartner v. United States, 322 U. S. 665) is applicable to expatriation cases arising under §401(j) of the Nationality Act of 1940, 54 Stat. 1137, as amended. . . ."

[10] Followed in *Augello v. Dulles*, 220 F. 2d 344, 345 (C. A. 3, 1955) and *Stipa v. Dulles*, 233 F. 2d 551, 556 (C. A. 3, 1956).

Following this Court's decision in *Gonzales*, the Court of Appeals for the District of Columbia held the same way in *Brunn v. Dulles*, 235 F. 2d 855, 856:

> "... the voluntary character of such acts (joining the armed forces, participating in a mass swearing of allegiance, voting) must be proved (by the Government) under the strict standards above referred to."

We believe the Third Circuit was correct in law in its *Lehmann*, *Augello* and *Stipa* decisions and that the District of Columbia Circuit, in its *Brunn* decision, correctly interpreted this court's decision in *Gonzales*.[11]

The court below erred, we submit, when it held [R. 74, 75] that the Gonzales principle applied only to Section 401(j) and not to 401(c) and when it held [R. 74, 75] that since petitioner had pleaded (and respondent had admitted in the answer) that he had entered and served in the armed forces of Japan, expatriation had been shown by the clear and convincing evidence required. In so doing, the court below not only disregarded the indispensable element of voluntary conduct essential before expatriation can be effected, but also misapprehended what was involved in the *Gonzales* case and, therefore, the purport of this Court's decision in it. The court below confused the element of intent (the court's words were "mental element" [R. 75]) with the element of voluntariness. They are not the same. Under Section 401(j) of the

---

[11] *Cf. United States v. Minker*, 350 U. S. 179, 193 (Mr. Justice Black concurring):

> "But citizenship, whether acquired by birth or by naturalization, cannot be taken away without a judicial trial in which the Government carries a heavy burden." (citing, *inter alia*, the *Gonzales* case)

1940 Act (58 Stat. 746; 8 U. S. C. (1946 Ed.) 801 (j)), merely remaining outside the United States in time of war for the purpose of evading or avoiding military service, is no more expatriating than merely serving in a foreign army while having the nationality of that state is expatriating under Section 401(c). In both instances the conduct must be voluntary. And, just as this Court said in *Gonzales* as to Section 401(j), so too, must be the rule as to 401(c); that the Government must prove all the elements by the strict standard of proof required in the denaturalization cases. The specific intent to evade or avoid military service does not, as the decision below implies, mean that a person has expatriated himself. One may very well remain outside the United States for the purpose of evading or avoiding military service, but this does not mean that he did so voluntarily. And without its being voluntary, there is no expatriation. This was the precise issue in *Gonzales*.

An examination of the record in *Gonzales* makes it very clear that Gonzales remained outside the United States in time of war "for the purpose of evading or avoiding military service." For example, Gonzales said, *inter alia:*

[R. 17-18]:

> "I would have come to the United States in 1944 or 1945 had it not been for the requirement to register."

[R. 20]:

"Yes" (in response to the question) [R. 19-20]:

> "Do you admit that you remained outside of the jurisdiction of the United States from September 1944 until April 23, 1946 for the purpose of evading

> or avoiding training and service in the land and naval forces of the United States?"

There was other evidence of a similar vein.

But Gonzales' cry to the courts was that though he remained outside the jurisdiction of the United States during time of war *for the interdicted purpose*, he did so involuntarily because his mother would not let him come. The fact that his mother would not let him come to the United States did not change the fact that he did the very thing which the statute, read literally, says is expatriating. But, because the Government has to prove all the elements of expatriation, including voluntariness, this Court reversed, since the Government's proof on this issue did not rise to the standard required. In other words, the crucial factual issue in the case was whether Gonzales' remaining outside the United States was voluntary, not whether his remaining out was for the purpose of avoiding military service.

In his Opening Brief in this Court, Gonzales said (p. 26):

> "The Government Did Not Produce Evidence Meeting the Standard of Proof Required . . . . (S)ince it is the Government's burden to establish the expatriation, this burden, and by the same degree of proof, must be carried as to all elements of the case. This mean's that the Government must thus prove, by this high standard of proof, not only that petitioner remained outside of the United States for the purpose interdicted by the statute but *also that he did so voluntarily*." (Italics added.)

And (pp. 30-31):

> "On this issue, the Government presented no proof. . . . It is immaterial whether (plaintiff's evidence)

> is sufficient proof to *establish* that petitioner's remaining away was *involuntary*. The point is that, absent positive proof by the Government in this type of case, it (plaintiff's proof, which, incidentally, the trial court did not believe, 215 F. 2d 957) casts sufficient doubt on the Government's case to establish that the remaining away for the interdicted purpose was voluntary." (Italics in original.)

And nearly one-half (Point I, D) of Petitioner's Reply Brief was devoted to pointing out how the Government's proof did not measure up to the standard required, especially on the voluntary issue.

In its brief, the Government, after pointing out (pp. 17-18) that the trial court did not believe Gonzales,[12] said (p. 22):

> "Petitioner cannot fairly claim that his mother's influence after he had grown up, amounted to duress *excusing* his remaining abroad." (Italics added.)

This statement by the Government in its brief points up the feature of the *Gonzales* case and of Section 401(j) of the 1940 Act which the court below overlooked. That feature is that two of the elements of that statute are completely objective and have nothing to do with intent specific or otherwise, namely: (1) remaining outside the United States; (2) during time of war. These two elements, just as the military service and Japanese nationality in the case at bar, were admitted in the *Gonzales* case. It is as to proof that the remaining out was voluntary,

---

[12]The trial court in *Gonzales* said (R. 33): "When a boy of that kind comes in and tells me his mother wouldn't let him out of the house, he couldn't come because his mother wouldn't let him out of the house, I don't know how such foolish statements can be made."

that the Government's case in *Gonzales* fell down. As noted from the Government's brief in *Gonzales*, it was there contending (p. 22, where it talks about petitioner "excusing his remaining abroad") just as the court below here ruled [R. 73] that plaintiff must prove the involuntary character of his act.

As seen, the Government failed in its argument. Since the Government did not prove, by the strict quantum of proof, that Gonzales' remaining away was voluntary, it did not prove expatriation. The same principle should have been, and must be, applied to the case at bar.

B.

On the Ordinary Burden of Proof, Even if Petitioner Had One Here, His Service in the Japanese Army Was Involuntary.

(1)

MILITARY SERVICE BY REASON OF CONSCRIPTION, CREATES A REBUTTABLE PRESUMPTION OF INVOLUNTARINESS. RESPONDENT DID NOT OVERCOME THIS PRESUMPTION.

There is no dispute about the fact that appellant was drafted in the Japanese Army [R. 18, 56, 57] under the compulsory military service law which provided criminal penalties for violation thereof [R. 22-23]. Contrary to what we believe the law to be, the court below held [R. 73]:

> "There is no presumption that one who is conscripted into the armed forces enters voluntarily. . . ."

Not only is this statement of law contrary to that of the Third,[13] Second[14] and District of Columbia[15] Circuits, on the precise question, but it is contrary to what this and other courts have said in this and other situations as to the involuntary nature of conduct under the compulsion of law.

In *Mandoli v. Acheson*, 344 U. S. 133, 135, this Court pointed out that:

> "The Government abandoned the first ground because the Attorney General ruled that such service in the Italian army by one similarly situated could only

[13] *Lehmann v. Acheson*, 206 F. 2d 502, 504:

> "Conscription into the Army of a foreign government of one holding dual citizenship is sufficient to establish *prima facie* that his entry and service were involuntary.
>
> "Upon consideration of the record we are of the opinion that the District Court erred in its determination that Lehmann had expatriated himself from United States citizenship. The Government has failed to rebut the presumption that his entry and service in the Swiss Army as a result of his conscription were involuntary."

[14] *Augello v. Dulles*, 220 F. 2d 344, 347:

> "The opinion of the court below shows that on the issue of duress the fact of the plaintiff's conscription was disregarded. And since there was no evidence to rebut the inference of duress flowing from the plaintiff's status as a conscript, there is no need to remand for further findings.
>
> "Reversed with a direction to grant the declaration sought."

[15] We believe that the purport of the District of Columbia Circuit's reasoning in *Bruni v. Dulles*, 235 F. 2d 855, 856 regarding the importance of conscription, when coupled with that Circuit's explanation of the appropriate criteria in *Soccodato v. Dulles*, 220 F. 2d 243, (in which it cited with approval [245 and 246] the Third and Second Circuit opinions in *Perri v. Dulles*, 206 F. 2d 586 and *Augello v. Dulles*, 220 F. 2d 344) and when viewed in the light of the other actual decisions of that Circuit in holding in favor of the citizen in this type of case (*Allata v. Dulles*, 221 F. 2d 52; *De Marco v. Dulles*, 226 F. 2d 265; *Bocce v. Dulles*, 226 F. 2d 265; *Saiti v. Dulles*, 226 F. 266; *Acheson v. Maenza*, 202 F. 2d 453) justify the conclusion that that circuit, as well, looks upon conscription as creating a presumption of involuntariness.

be regarded as having been taken under legal compulsion amounting to duress.'"

This confession of error by the Attorney General and the concurrence therein by this Court is not to be treated lightly. It is firmly established that this Court is in no way bound by a confession of error by the Government and will examine independently the issues involved. As the Court said in *Gibson v. United States*, 329 U. S. 338, 344, n. 9:

> "A confession of error on the part of the United States 'does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed.' *Young v. United States*, 315 U. S. 257, 258-259."[18]

In the Attorney General's opinion (41 Ops. Atty. Genl. No. 16) referred to in the *Mandoli* case, the Attorney General had said:

> ". . . Generally, it may be assumed that an act performed under legal compulsion lacks the voluntariness of choice that is essential to accomplish expatriation. . . ."

We believe this is just another way of saying that military service due to conscription raises a presumption of involuntary conduct.

---

[18]Indicative of the importance given by the Court to its independent re-examination is that, in at least one instance, *Weber v. United States*, 315 U. S. 787, the judgment of the lower court was affirmed despite the Government's confession of error. Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951 Ed.), p. 666.

Noting the anomalous position of the Government in the *Lehmann* case as compared with its concession in the *Mandeli* case, 344 U. S. 133,[17] the court said (209 F. 2d 590):

> "We can see no valid reason for making any distinction between service by conscription in the Swiss Army, for in both instances the conscript acts under compulsion of law and the duress sanctions in the event of non-compliance."

In *Adams v. Maryland*, 347 U. S. 179, this Court affirmed, in effect what the Courts of Appeal had said in the *Lehmann*, *Perri* and *Angello* cases. In the *Adams* case this Court recognized that one who appeared before a Senate investigating committee by virtue of having been subpoenaed did not act voluntarily. The court said (347 U. S. at 181):

> ". . . He was not a volunteer. He was summoned. Had he not appeared he could have been fined and sent to jail."

See also *Cudahy Packing Co. v. Holland*, 315 U. S. 357, 363, commenting on the coercive nature of a subpoena, and *Kawakita v. United States*, 343 U. S. 717, 728, where the court notes the difference between one who is drafted and one who volunteers.[18]

---

[17] With which this Court agreed. "The choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all." (344 U. S. at 135.)

[18] Cf. also *Pedersen v. National Labor Relations Board*, 234 F. 2d 417, 419 (C. A. 2, 1956): "Here the act which resulted in petitioner's loss of employment was not *induced* by Board action, rather it was *compelled* by the Board. The Board subpoenaed Pedersen to testify. If he had not responded to the subpoena he might well have been compelled to testify by a court order issued under 29 U. S. C. A. §161(2)." (Italics in original.)

Accordingly, we submit, the law is that military service due to conscription raises a presumption of involuntary conduct, and, as a matter of law, since respondent failed to overcome that presumption, petitioner is entitled to a reversal.

(2)

IRRESPECTIVE OF THE PRESUMPTION, THE COURTS BELOW DISREGARDED THE PRINCIPLE THAT IN MATTERS INVOLVING LOSS OF CITIZENSHIP "THE FACTS AND THE LAW SHOULD BE CONSTRUED AS FAR AS IS REASONABLE IN FAVOR OF THE CITIZEN." IN SO DOING, THEIR HOLDINGS THAT PETITIONER ACTED VOLUNTARILY IS CLEARLY ERRONEOUS.

The law is clear, that in matters involving loss of citizenship, whether by way of denaturalization or expatriation (*Gonzales v. Landon*, 350 U. S. 920), "the facts and the law should be construed as far as is reasonable in favor of the citizen." (*Schneiderman v. United States*, 320 U. S. 118, 122.) In *Baumgartner v. United States*, 322 U. S. 665, 670, 671, this Court went to great pains to distinguish the considerations in the usual type of case and one involving, as here, "a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen." (322 U. S. at 670.)

The court below disregarded these principles and admonitions by this Court. As a result, the decision below stands virtually alone and is out of line with the overwhelming weight of appellate authority, most of which

have been reversals of cases in which there had been actual findings of voluntary conduct by the trial courts.[19]

The facts in this case, which this Court will scrutinize very closely in a case of this kind (*Baumgartner v. United States*, 322 U. S. 665, 671), are such that even irrespective of the court below's failure to apply the correct standard, as set out above, a finding of voluntary conduct is clearly erroneous, whether expressed in terms of resolving factual doubts in favor of citizenship, or in terms of the necessity of proving expatriation by clear, unequivocal and convincing evidence. (*Soccodato v. Dulles*, 220 F. 2d 243, 247 (C. A. D. C., 1955); *Stipa v. Dulles*, 233 F. 2d 551, 556 (C. A. 3, 1956).)

The evidence is that, not only did petitioner respond to the draft call because required to do so by law, but that he feared drastic treatment at the hands of the Kempei Tei if he failed to so do [R. 37, 47]. This evidence, when viewed against the background of totalitarian, mili-

---

[19] See, *e.g. Alata v. Dulles*, 221 F. 2d 52 (C. A. D. C., 1955); *Soccodato v. Dulles*, 220 F. 2d 243 (C. A. D. C., 1955); *DeMarco v. Dulles*, 220 F. 2d 265 (C. A. D. C., 1955); *Bocco v. Dulles*, 220 F. 2d 265 (C. A. D. C., 1955); *Santi v. Dulles*, 220 F. 2d 266 (C. A. D. C., 1955); *Acheson v. Maenza*, 202 F. 2d 453 (C. A. D. C., 1953); *Angello v. Dulles*, 220 F. 2d 344 (C. A. 2, 1955); *Lehmann v. Acheson*, 206 F. 2d 592 (C. A. 3, 1952); *Mendelsohn v. Dulles*, 207 F. 2d 37 (C. A. D. C., 1953); *Monaco v. Dulles*, 210 F. 2d 700 (C. A. 2, 1954); *Pandolfo v. Acheson*, 202 F. 2d 38 (C. A. 2, 1953); *Poon v. Dulles*, 206 F. 2d 500 (C. A. 3, 1953); *Podea v. Acheson*, 179 F. 2d 306 (C. A. 2, 1950); *Dos Reis ex rel. Camara v. Nicolls*, 161 F. 2d 800 (C. A. 1, 1947).

taristic, tyrannical Japan,[20] shows coercion and compulsion of the strongest nature,[21] and courts which have considered the matter in similar cases have so recognized.

In *Kawato v. Acheson*, 92 F. Supp. 183 (D. C. S. D. Cal., 1950), the court said:

> "For some years prior to Pearl Harbor and until the surrender of Japan in 1945, Japan and its people were under the control of the military authorities of Japan, and the Secret or Thought Police, and the Special Higher Police; and during that period the people of Japan were generally in fear of them and particularly in fear of physical punishment, from the Japanese military authorities, the Secret Police and the Special Higher Police."

---

[20]We have set out in Appendix "A" a few excerpts from official and other authoritative accounts of the nature of Japan at the time here involved. Fuller extracts have been lodged with the clerk of this Court. (See footnote 6 *supra*.) This Court can take judicial notice of their contents. (*N. L. R. B. v. F. C. Atkins Co.*, 331 U. S. 398, 406; *Standard Oil Co. v. Johnson*, 316 U. S. 481, 483, 484; *Tempel v. United States*, 248 U. S. 121, 126; *Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368, 375; page 11 of brief for government in *Hirabayashi v. United States*, 320 U. S. 81; *Maritime Union v. Herzog*, 78 F. Supp. 146 (D. C. D. C., 1948), aff'd 334 U. S. 854):

> "We judicially know the facts of current history and cannot close our eyes to them and to their significance."

United States v. Kusche, 56 F. Supp. 201, 206 (D. C. S. D. Cal., 1944):

> "A proposition which is common knowledge, and of which the court can take judicial notice, viz., that when Hitler came to power in 1933 he suspended the personal liberty provisions of that Constitution and thereupon and thereafter he established an absolute dictatorship based upon the tenets of national socialism."

Other cases in accord are: *Ex parte Milligan*, 4 Wall. (U. S.) 2, 18 L. Ed. 281, 296 (that the federal authority in Indiana was always unopposed); *The Apollon*, 9 Wheat. (U. S.) 362, 374, 6 L. Ed. 111, 114 (that smugglers infested that particular area); *Ponce v.*

In *Kato v. Acheson*, 94 F. Supp. 415, 416 (D.C. S.D. Cal., 1950), it was said:

> ". . . the plaintiff and other young American born Japanese, before the war was on and thereafter, found themselves in an atmosphere in Japan of being dominated by a cruel and unjust military government, although they had only gone to Japan to receive an education, and their desire and intention was to return to the United States, but were refused a passport. Their situation there is clearly reported as to such circumstances in the official report of General MacArthur to the United States after an investigation. He, after making an investigation, found that the military forces of Japan prior to and until Japan surrendered, ruthlessly and brutally dominated Japan regardless of the rights of all, and it is easy to

Roman Catholic Church, 210 U. S. 296, 309 (of the history of Puerto Rico and its legal and political institutions up to the time of its annexation by the United States); *DeWitt v. Hicks*, 161 F. 2d 787 (C. C. A. 9, 1947), cert. den. 332 U. S. 768 (military problems facing General DeWitt during the war); *Ex parte Zimmerman*, 132 F. 2d 442, 445 (C. C. A. 9, 1952), cert. den. 319 U. S. 744 (that the Hawaiian Islands and the Pacific area of the United States were faced with an imminent threat of invasion at the beginning of the war); *Hirota v. Wade*, 169 F. 2d 973, 976 (C. A. 10, 1948), aff'd 336 U. S. 684, reh. den. 337 U. S. 921 (that during the war in Europe, the United States armed forces were moving rapidly and conditions in the field were fluid); *In re Bush*, 84 F. Supp. 873 (D. C. D. C., 1949) (that on the surrender of Japan the American armed forces occupied Japan); *Coulton v. Sperry Gyroscope Co., Inc.*, 67 F. Supp. 219, 221 (D. C. E. D. N. Y., 1946) (of industrial conditions which existed in the nation during the period immediately before the war and during the war); *Atchison T. & S. F. R. Co. v. United States*, 284 U. S. 248, 260; *Skendzel v. Rose Manor Realty Co.*, 80 F. Supp. 619, 622 (D. C. E. D. Wisc., 1948); *The Pietro Campanella*, 73 F. Supp. 18, 27 (D. C. D. Md., 1947).

[21] *Cf. Acheson v. Maenza*, 202 F. 2d 453, 459 (C. A. D. C., 1953): "That testimony must be considered in connection with the well-known ruthlessness of the Fascist regime which, even as early as 1935, would hardly have tolerated resistance to its draft laws by an admitted national of Italy."

> ascertain the dominating atmosphere and situation this plaintiff and others were in which the military forces of Japan arbitrarily dominated."[22]

We have previously mentioned this Court's recognition in *Mandoli v. Acheson*, 344 U. S. 133, 135 that action under such circumstances is not voluntary. In that case this Court accepted the view of the Attorney General that

> ". . . 'The choice of taking the oath or violating the law was for a soldier in the Army of Fascist Italy no choice at all' . . ."

The reasoning of the court below in upholding the trial court's finding of voluntary conduct [R. 74] is based not upon what petitioner *did* do, but on what he did *not* do.[23]

We submit that this is a slender reed, indeed, upon which "to reduce a person to the status of alien from that of citizen." And it is a far cry from construing the facts as far as is reasonable in favor of the citizen. And, when measured in the light of the coercive conditions under which these "sins of omission" occurred (see Appendix "A", documents lodged with the Clerk of this Court and discussion, *supra*, pp. 21-24) the lack of substance to sustain the decision below appears overwhelming.

---

[22]See also cases involving Italian military service cited *supra*, in footnote 19.

[23]*E. g.*, did not go to the American Consulate and tell them that he did not want to serve in the Japanese Army [R. 68]; did not tell any Japanese official that he was an American citizen [R. 68] (there is no showing in the record that the Japanese officials did not know this fact; it is to be assumed they did), did not make an effort to renounce his Japanese nationality [R. 68] (there is nothing in the record to show that there was any provision in Japanese law permitting such a thing or that, if there was, petitioner knew about it), did not protest against induction in the army or the taking of the physical examination [R. 69].

Moreover, we believe the correct view to be as stated by the Third Circuit in *Lehmann v. Acheson*, 206 F. 2d 502, 506:

> "An analysis of the District Court's opinion discloses that its determination was premised on acts of omission, rather than commission, on the part of Lehmann with respect to his service in the Swiss Army and attending circumstances.
>
> "The omissions enumerated in the opinion were:
>
> "(1) On his 1941 visit to the American consulate at Basel, Lehmann failed to furnish proof of his birth in the United States and failed to inquire how he could establish his American birth.
>
> "(2) On that same visit he did not ask specifically for the protection of the American consulate and expressed no desire to register as an American citizen.
>
> "(3) He did not protest at the time he entered the Swiss Army or at the time he took the oath of allegiance.
>
> "With respect to these 'omissions' it need only be said that they were utterly irrelevant to the critical issue of 'voluntariness.'"

The irrelevance of the argument is made the more apparent in *Monaco v. Dulles*, 210 Fed. 760 (C. A. 2, 1954), where the plaintiff in that case actually "ignored the warning of the State Department, made in response to Italian laws of dual nationality, to secure permission to enter Italy without liability for military service." (210 F. 2d at 761.) In that case the court pointed out that (*ibid.*):

> "Neither he nor any member of his family, nor a friend who accompanied him to Socco, ever made an attempt to secure the aid of American consular or diplomatic officials."

And see also the following:

Pandolfo v. Acheson, 202 F. 2d 38, 40:

> "Appellant (Government) stresses the fact that plaintiff did not protest to any United States consulate that he was being forced to enter Italian military service under duress."

United States v. Eliasen, 11 F. 2d 785, 786 (D. C. W. D. Wash., 1926):

> "Failure to register or report to consuls abroad is immaterial; . . ."

Soccodato v. Dulles, 226 F. 2d 243, 245:

> "His failure . . . to seek release from the army did not cause a loss of citizenship."

In *United States v. Di Re*, 332 U. S. 581, 594, this Court refused to "penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law" when it came to the question of whether there had been a loss of the constitutional protection against illegal search and seizure. Accord: *Johnson v. United States*, 333 U. S. 10, 13; *Amos v. United States*, 255 U. S. 313, 317. We suggest that likewise no such futility should be required when it comes to the question of loss of citizenship itself.[24]

---

[24] In *Bergan v. Badham* (App. Dept., Calif. Superior Court; Los Angeles County, July, 1950 Los Angeles Daily Journal Reports, p. 12), attorneys signed *without protest* a document substituting them out as attorneys in a case. Their assignees instituted suit for reasonable value of services performed. The trial court found that the services performed were of greater value than the attorneys had been paid but nevertheless gave judgment to defendants on the ground that by not protesting the attorneys had in effect agreed not to be paid or had waived their right to payment. In reversing,

See also the Attorney General's view (41 Op. Atty. Genl. No. 16, referred to in the *Mandoli* case):

> ". . . While there is no evidence in the record bearing on whether a discharge could have been obtained, or, if so, whether Mr. Panzica was aware of the possibility, we can take note of the fact that it was the policy of the Italian Government to require military service of dual citizens who had resided for more than two years in Italy (3 Hackworth, *Digest of International Law* (1942), 189), and there is no apparent reason why Mr. Panzica should have expected that his case would be regarded by the Italian authorities as exceptional. Mr. Panzica also has stated that he believed that any request on his part for special treatment would have been futile. In these circumstances, I do not believe that his failure to seek a discharge from the Italian Army rendered either his continued service or his oath of allegiance a voluntary act resulting in expatriation."

While conceding [R. 37] that petitioner did not know when he went to Japan that Congress would adopt Section 401(c), and that he did not know when he went into the army that he would lose his citizenship, nevertheless the trial court based its ruling on the theory that petitioner "just refrained from protecting his rights as a citizen." [R. 56.] To just what rights the court had reference does not appear. If it meant a right to be excused, upon

---

the appellate court (after pointing out that under the law a party is entitled to discharge his attorney) gave this intriguing example:

> "A man condemned to the gas chamber may put up a fight, when his executioners call upon him, or he may bow to the inevitable and go along quietly. If he pursues the latter course, the consent that he gives is not voluntary, but without choice. So was the consent given by plaintiff's assignors . . . in this case."

representations by the American Consulate on his behalf from Japanese military service because he was an American citizen, even though he was also a Japanese citizen living in Japan, there is simply no such "right". Not even the United States, which is a government of laws and not of the Kempei Tei, recognizes such a "right" (*Cf. Takeuma v. United States*, 156 F. 2d 437 (C. A. 9, 1946).) Moreover, even if appealed to, the American Consulate would make no such representation on petitioner's behalf (State Department Publication No. 1316, par. 29, p. 17): ". . . . . (i)t is not the practice of the (State) Department to make representations in his (a dual citizen's) behalf with a view to his release from the performance of military or other obligations to the foreign country."[28]

Furthermore, the theory that to retain one's United States citizenship, a dual citizen, must, in effect, "elect" between one and the other, is contrary to law (*Nishikawa v. Dulles*, 356 U. S. 129; *Kawakita v. United States*, 343 U. S. 717; *Perez v. Brownell*, 356 U. S. 44; *Trop v. Dulles*, 356 U. S. 86; *Nishikawa v. Dulles*, 356 U. S. 129; *Kichi v. Dulles*, 356 U. S. 30; *Kamada v. Dulles*, 356 U. S. 25; *Mandoli v. Acheson*, 344 U. S. 133).

A second facet of the reasoning of the court below in affirming the trial court is that the trial court was not re-

[28]That the trial court was of the erroneous view that the petitioner could, or the American Consulate would, do something about getting him out of military service, is seen from these questions asked by the court [R. 48]:

"The Court: So, even though you were a United States citizen you made no effort at all to find out whether you could get out of serving in the Japanese army when you didn't want to serve in the Japanese army? They could force you to even though you didn't want to? They could force an American citizen to serve in the Army?

. . . . . .

"The Court: And then you believed that as an American citizen that Japan could force an American citizen into the army and there wasn't anything that you could do about it, is that right?

quired to believe petitioner [R. 74] and that it was entitled to find the facts to be exactly contrary to the evidence, because the witness, petitioner, was interested in the outcome of the case [R. 73]. The trial court, this Court's decision in *Mandoli v. Acheson*, 344 U. S. 133 and the Italian military service cases cited in footnote 19, *supra*, to the contrary notwithstanding, said, when petitioner testified he was afraid of the Kempei Tei, "how ridiculous for me to believe his story." [R. 55.][26] This element of the case bears close resemblance to the trial court's view in *Gonzales v. Landon*. There, too, the trial court said [R. 32 of Record in *Gonzales v. Landon*, No. 111, Oct. Term, 1955 before this Court]: "I don't believe his testimony" and "I don't see how such foolish statements can be made." [*Ibid*, p. 33.]

But this facile view of the evidence is not permitted even in an ordinary case, let alone an expatriation case. The court below overlooked not only this court's admonition in the *Baumgartner* case, but even the rule in ordinary cases.

In *United States ex rel. Schachter v. Curran*, 4 F. 2d 356, 358 (C. C. A. 3, 1925), the court approved Judge Hand's statement that:

> "It is not enough for the Board of Special Inquiry to say that they do not believe. . . . They have no power to dispense with the usual means of ascertaining the truth."

In 31 C. J. S. Evidence, Sec. 104, p. 711, note 79, the rule is put:

> "Falsity of opponents testimony does not prove what is true, and disbelief does not supply need of proof."

---

[26]The trial court also said [R. 56]: "If it were a plot in the wildest sort of a television story it couldn't be believed, couldn't be accredited by anyone seeking the truth."

In the light of this Court's decision in the *Mandoli* case and the many Italian military service cases cited in footnote 19, *supra*, as well as in the light of the many trial court cases which have passed upon cases involving military service in Japan[27] (see also Appendix herein and documents lodged with the clerk of this Court), it cannot be said that petitioner's testimony was inherently improbable, nor can it be claimed that there were in it inconsistencies or that facts contradict it. Therefore, even aside from the error of supplying facts contrary to it, the testimony cannot be disregarded merely because given by an interested party (*Chesapeake & Ohio Ry. Co. v. Martin*, 283 U. S. 209, 215-216; *Pence v. United States*, 316 U. S. 332, 339-340.)

Absent some reason to the contrary, apparent on the record (deductions from evidence cannot be arbitrary (*Flynn ex rel. Vee Suey v. Ward*, 104 F. 2d 900, 902 [C. C. A. 1, 1939]) these principles control: A witness is presumed to speak the truth (Cal. Code Civ. Proc., Sec. 1847); it cannot be assumed that a witness, even a party, answers dishonestly (*Hickman v. Taylor*, 329 U. S. 495, 509).

---

[27] *E. g., Ishikawa v. Dulles*, 85 F. Supp. 1 (D. C. Haw., 1949); *Kato v. Acheson*, 94 F. Supp. 415 (D. C. S. D. Cal., 1950); *Moriizumi v. Acheson*, 101 F. Supp. 976 (D. C. N. D. Cal., 1951); *Murata v. Dulles*, 111 F. Supp. 300 (D. C. Haw., 1953); *Yoshida v. Dulles*, 116 F. Supp. 618 (D. C. Haw., 1954); *Serizawa v. Dulles*, 134 F. Supp. 713 (D. C. N. D. Cal., 1955); *Okada v. Dulles*, 134 F. Supp. 183 (D. C. N. D. Cal., 1955); *Namba v. Dulles*, 134 F. Supp. 633 (D. C. N. D. Cal., 1955); *Shibata v. Acheson*, 86 F. Supp. 1 (D. C. Haw., 1949); *Kanno v. Acheson*, 92 F. Supp. 183 (D. C. S. D. Cal., 1950); *Ozasa v. Acheson*, 94 F. Supp. 436 (D. C. S. D. Cal., 1950); *Okimura v. Acheson*, 111 F. Supp. 303 (D. C. Haw., 1953); *Terada v. Dulles*, 121 F. Supp. 6 (D. C. Haw., 1954).

It is not clear as to just what part of petitioner's testimony the trial court did not "believe". It will be recalled that all the evidence in the case, both oral and documentary, was adduced by petitioner. The trial court accepted at least a part of petitioner's testimony. Thus the trial court believed petitioner when he testified (1) that he was born in the United States [R. 10]; (2) that he claimed permanent residence in Los Angeles (*ibid.*); (3) that he went to Japan in August 1939 [R. 11]; (4) that he was drafted into the Japanese Army [R. 24, 56];[28] (5) that he applied at the American Consulate at Yokohama for an American passport to return to the United States but was denied on the ground that he had expatriated himself [R. 12].

What, then, was it that the court did not believe? During its oral opinion, the court said, [R. 55-56]:

> "How ridiculous for me to believe his story that in the summer of 1940, when he was notified to report, that for a year he didn't do anything to leave Japan and didn't make any effort to leave Japan. . . ."

As the *Lehmann* case has made clear (and it is noted that the government did not even seek review) the view of the law suggested by this statement is erroneous. And as this Court has made clear in *Mandoli*, there is no requirement that petitioner leave or try to leave the country. Indeed, in *Monaco*, the appellant there, not only did not leave Italy, but actually went there after having been warned by the State Department that he would be subject to

---

[28]The court admitted into evidence [R. 24] the stipulation as to the Japanese military law which showed that a violation of a conscription order was a crime, punishable by imprisonment [R. 23]

military service and not to go without making sure that he could enter Italy without such liability. But more than that—what did the trial court mean? Was it suggesting, contrary to the evidence, that petitioner did try to leave Japan? Certainly this cannot be so because in its findings [V; R. 11] it found that petitioner made no effort to return to the United States. What, then, did the trial court disbelieve? That there was a Kempei Tei in Japan [R. 37, 49]? That petitioner feared what the Kempei Tei might do if he failed to obey the law [R. 37, 49]? That the military controlled the Japanese government and that even high officials were killed in their homes [R. 37]? No answer to these questions is apparent.

But the trial court did more than simply disbelieve petitioner as to some part of his testimony. The court actually and affirmatively supplied evidence, none of which is in the record, and some of which is directly contrary thereto. Thus the trial court said [R. 58]:

"He knew he was going to be drafted."

This view of the evidence the court incorporated in its formal findings [III; R. 11]. But the evidence is just to the contrary as seen from this question and answer on cross-examination [R. 25]:

"Q. And you knew, did you not, Mr. Nishikawa, that if you went to Japan you were likely to be drafted in the Japanese army; is that correct?

". . .

"The Witness: No, sir."

Even if, despite that there was no reason, this answer was not believed, it furnishes no basis, there being no other

evidence on the matter in the case, for affirmatively finding the contrary as the fact.

Admittedly, there is law to the effect that a trial court is not bound, under all circumstances, to accept the uncontradicted testimony of a witness. (*Quock Ting v. United States*, 140 U. S. 417, 420, 35 L. Ed. 501, 502.) But the decision not to so credit the witness must be a judicial, not an arbitrary, one, and, unless there is some inherent improbability, or contradiction, or omission or some other substantial reason for doubting the witness' sincerity, the general rule that the court is bound by the uncontradicted testimony, must prevail. (*Ibid.*) There is none of these exceptional circumstances here. Moreover, not only is there no contradiction of petitioner's testimony, but there is actual corroboration in the record in the form of the Japanese Military Service Law [R. 22-23]. Add to this the facts, of which judicial notice may be taken (see footnotes 6 and 20, *supra*), even if there were a balance, the weight is thrown overwhelmingly in favor of petitioner. Certainly the record here does not justify the court in supplying facts which are not there.

The gravamen of the court's error in finding the ultimate fact [III, R. 12] that petitioner's entry and service in the Japanese Armed Forces was his free and voluntary act, is not that the trial court did not believe petitioner, but rather the court's erroneous view of the law as to what is required of a dual national in order to avoid expatriation, coupled with an erroneous view as to what he could do. The theme of "sins of omissions" runs clear through the trial court's oral opinion. Thus, in distinguishing this case from a Nisei who had gone to Japan when he was very young, the court said [R. 55]: "Of course, there wasn't anything he (such a Nisei) could

do. There was no way he could leave Japan. He was drafted. He had no choice. He went into the service or he went to jail." Thus intimating that if petitioner did not go into the service he would not go to jail, and that there was a duty to risk same in any event. Again, the court said [R. 56]: "He just refrained from protecting his rights as a citizen" and *therefore*, "(H)is service could not be considered involuntary" [R. 57]. Aside from the fact that this demonstrates the court's erroneous view of the law as to where lies the burden of proof on the voluntariness issues (discussed above) these excerpts also demonstrate an erroneous view as to the duty of a dual national, in order to avoid expatriation, to fail to omit, but to do. (*Mandoli v. Acheson*, 344 U. S. 133; *Lehmann v. Acheson*, 206 F. 2d 592 (C. A. 3, 1953).)

Despite the circumstances under which petitioner was drafted, the decision below violates the rule that "The law does not exact a crown of martyrdom as a condition of retaining citizenship." (*Acheson v. Maenza*, 202 F. 2d 453, 459 (C. A. D. C., 1954).) The courts have rejected "the adoption of a Spartan standard by which to determine whether the appellant acted voluntarily." (*Mendelsohn v. Dulles*, 207 F. 2d 37, 39 (C. A. D. C., 1953).) To paraphrase *Podea v. Acheson*, 179 F. 2d 306, 309 (C. A. 2, 1950), petitioner "never voluntarily expatriated himself . . . by serving in the (Japanese) army. (This) step (was) required by the situation in which he found himself. . . ."

The conclusion of the trial court that petitioner went to Japan wanting to get into the Japanese Army [R. 56] is just contrary to that urged (successfully) by the Government in *Kawakita v. United States*, 343 U. S. 717, where the shoe was on the other foot and the Government

won out in contending in a treason case that petitioner did not lose his United States citizenship, but where petitioner there, also went to Japan during a time of "cold" war between Japan and the United States [R. 46]. See also, *Yoshida v. Dulles*, 116 F. Supp. 618, 620 (D. C. Haw., 1954), where plaintiff there went at a time (April, 1941) when the war was even "colder" or "hotter", depending upon one's view of those terms.

Upon a view of the whole case, we submit, the trial court's finding that petitioner acted voluntarily is "clear error". (*Baumgartner v. United States*, 322 U. S. 665, 672.) This is a case where, rather than construing the facts as far as reasonable in favor of the citizen (*Schneiderman v. United States*, 320 U. S. 118, 122), the courts below did just the opposite, and by piling non-existing inference upon non-existing inference construed the facts against the citizen.

At least, and even if, somehow, it is claimed that there is evidence in the record to support the finding of voluntary conduct, nevertheless the finding is clearly erroneous and the principle of *United States v. United States Gypsum Co.*, 333 U. S. 365 applies. This Court there said (333 at 395):

> ". . . a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This is particularly true in this kind of a case in light of this Court's ruling in *Gonzales v. Landon*, 350 U. S. 920.

II.

8 U. S. C. 801(c) Should Not Be Construed to Apply to the Facts of This Case.

It is axiomatic that statutes are to be construed, if at all possible, to avoid passing upon grave constitutional questions. (*United States v. C.I.O.*, 335 U. S. 106.) Such is especially the case here. "There is another reason for reading the section narrowly. When we deal with citizenship we tread on sensitive ground." (*United States v. Minker*, 350 U. S. 179, 197, Mr. Justice Douglas, concurring.)

The circumstances under which petitioner served in the Japanese Army are that he was a dual citizen of that country and this, and was drafted pursuant to the law of Japan in which he was at the time residing. In other words, he obeyed the law of the country in which he found himself and of which he was a citizen. By virtue of the principles set forth in the cases discussed below, both by way of persuasive, if not, indeed, actually binding, precedent, and in order to avoid meeting the constitutional question, the section should not be interpreted to compel expatriation.

In *Kawakita v. United States*, 343 U. S. 717, 723, 725, this Court said:

> ". . . He (Kawakita) had a dual nationality, a status long recognized in the law. . . . The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilties of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other. . . .

"As we have said, dual citizenship presupposes rights of citizenship in each country. It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other. . . ."

In its Brief in Opposition in that case (No. 220 Misc., Oct. Term, 1951) the Government said (pp. 11-12):

". . . the country of residence can force such a national to serve in its armed forces. . . . *Petitioner was unequivocally excused for conduct required of him by the laws of Japan.*" (Italics added.)

Lehmann v. Acheson, 206 F. 2d 592, 598 (C.A. 3, 1953), involved conscription into the Swiss Army of an American citizen who also had Swiss citizenship. Said the court, after setting out the quotation from *Kawakita*, *supra*:

"Lehmann's actions were certainly within the periphery of the principles stated. As a Swiss citizen he was required to submit to its conscription laws and that apart from the factor that he would have been subjected to punishment had he done otherwise. We can see nothing in the record which would possibly justify a finding that Lehmann did aught but what was obligatory upon him by virtue of his dual citizenship under the laws of Switzerland. . . ."

In *Okimura v. Acheson*, 111 F. Supp. 303, 305 (D.C. Haw., 1953), the court, again after referring to *Kawakita*, said:

". . . Being a citizen of Japan as well as of the United States, but living in Japan, the plaintiff was subject to and under compulsion and obligation to comply with the Japanese laws. His complying with the Japanese conscription law and voting in the gen-

eral elections of Japan were acts commensurate with those of Japanese citizens living in Japan. Without more, these acts cannot amount to renunciation of United States citizenship acquired by reason of birth."

Orfield, in his article "The Legal Effects of Dual Nationality", 17 Geo. Wash. L. R. 427, 429, 431, says:

"In practice, however, it is the presence of the individual who remains or resides within its territory, which justifies a state claiming him as a national, though another state also claims him, in exacting from him the performance of duties that ordinarily may be demanded of a national. (Citing 2 Hyde, International Law (2d ed. 1945) p. 1113; Hanna, *Nationality and War Claims* (1945), 45 Cal. L. Rev. 301, 308-309). This is true of both adults and minors. The other state should not and does not interfere with the first state's claim to him. With respect to physical control over his body only the state of his residence may reach him.

". . . He (a person with dual nationality) is not entitled to protection by one of the two states of which he is a national while in the territorial jurisdiction of the other. (Citing Article 4 of the 1930 Hague Convention on Conflict of Nationality Laws.) Either state not at war with the other may insist on military service when the person is present within its territory. . . .

". . . When a person of dual nationality resides in one of the states of his nationality, the other will not generally espouse a claim on his behalf against the country of his residence." (Citing: The *Canevaro Case* (1912); Scott, Hague Court Reports 284 1916); *United States (Alexander Tellech) v. Austria and Hungary*, Tripartitite Claims Commission, Decisions and Opinions (1929) p. 71.)

In his opinion of May 8, 1951 (41 Ops. Atty. Gen. No. 16), called to the attention of this Court in *Mandoli v. Acheson*, 344 U. S. 133, the Attorney General said in ruling that there was no expatriation:

> ". . . He served in the Italian army only for the minimum time required by law, and he does not appear to have done anything savoring of allegiance to Italy beyond what he was compelled to do. . . ."

These cases, statements and reasonings, together with this Court's decision in *Mandoli v. Acheson*, 344 U. S. 133, demonstrate that merely obeying the law of a country in which one resides, at least when coupled with the fact that the person has the citizenship of that country, does not amount to expatriation from the citizenship of the country in which he is not present at the moment. To hold otherwise—to hold that dual nationality does exist, but at the same time to hold that the exercise of that dual nationality imposes loss of it—is arbitrary and unreasonable, and hence, we submit, a denial of due process under the Fifth Amendment.

We have previously called to the attention of this Court the case of *Takeguma v. United States*, 156 F. 2d 437 (C. C. A. 9, 1946), wherein the court held that even a person who had expatriated himself from United States citizenship under 8 U. S. C. 801(i) was not excused from the draft laws of this country. How, then, is it commensurate with due process—with our orderly concept of justice—to interpret Section 401(c) so as to impose loss of citizenship in the instant case?[29] It is incongruous for

---

[29] *Cf.* Universal Declaration of Human Rights, Art. 15(2) (35 A. B. A. J. L. 32, 33): "No one shall be arbitrarily deprived of his nationality nor denied the right of change of nationality."

us in this country to compel military service of aliens, but yet to say when another country does the same thing, involuntary expatriation is imposed. The statute should not be thus interpreted.[39]

If petitioner's arguments thus far are not accepted, then the constitutional issue is squarely presented, and the question is whether Congress has the power, under the Fifth and Fourteenth Amendments, to impose loss of citizenship on a native-born citizen, against his will and consent and without his knowledge of the consequences of his acts.

III.

8 U. S. C. 801(c) Is Unconstitutional on Its Face and as Applied.

(1)

Preliminary Statement.

The bald and undenied effect of the compulsory imposition of loss of citizenship under the section is that Congress is taking away that which the Constitution has given.

Unlike the power of Congress, pursuant to Article I, Section 8, Clause 4, to condition the grant of naturalization (*cf. Lapides v. Clark*, 176 F. 2d 619, cert. den. 338 U. S. 860, reh. den. 338 U. S. 888, Congress has no such power, absent consent, to take away that which the Constitution grants a native-born citizen.

---

[39] *Cf.* 25 So. Cal. L. Rev. 196, 199 (commenting on and approving *Okimura v. Acheson*, 99 Fed. Supp. 587 (D. C. D. Haw., 195):

> "If aliens may serve in the United States Army . . . and yet remain aliens, it does not appear reasonable for Congress to say that American nationals may not do so in a foreign country without constructively intending to lose their nationality."

Petitioner is a citizen of the United States, not by grace of Congress, nor by its Act. He is a citizen by virtue of the United States Constitution (Fourteenth Amendment). A constitutional right which the *Constitution* and not *Congress* grants him, may not be taken away from him involuntarily. Article VI, Section 2 of the Constitution provides that "(t)his Constitution and the laws of the United States made in pursuance thereof . . . (are) the supreme law of the land." It can scarcely be said that a law which takes *away* citizenship which has been *granted* by the Constitution is a law made *in pursuance* of that Constitution. On the contrary, such an act is in direct derogation thereof.

In *Dos Reis v. Nicolls*, 161 F. 2d 800 (C. C. A. 1, 1947), the court discusses the constitutional problem here involved (161 F. 2d at 802) and expresses doubt as to the validity of such legislation, but does not reach the question because it construed the section in such a way as to avoid it. However, that court did recognize that expatriation cannot be effected unless the act performed or condition entered into is performed voluntarily "with notice of the consequences." And that court quoted from *Mackenzie v. Hare*, 239 U. S. 299, 311, that

> "a change in citizenship cannot be arbitrarily imposed, that is imposed without the concurrence of the citizen."

Holding directly that *Congress* has no authority to destroy, diminish, or dilute the *United States citizenship conferred by the Fourteenth Amendment to the Constitution of the United States*, is *United States v. Wong Kim*

Ark. 169 U. S. 649. In that case the Court declared (at p. 703):

> "... *The power of naturalization, vested in Congress* by the Constitution, *is a power to confer citizenship*, not a power to take it away." (Italics added.)

See the recent article by Professor Hurst, "Can Congress Take Away Citizenship," 29 Rocky Mount. L. Rev. 62, in which he holds that Congress can not so do.

(2)

THE RIGHT OF EXPATRIATION IS NOT TO BE EQUATED WITH THE PENALTY OF EXPATRIATION.

It is clear that a United States citizen may not renounce his citizenship without the consent of the Sovereign.

In *Shanks v. Dupont*, 3 Pet. (U. S.) 242, 246, this court said:

> "The general doctrine is, that no persons can, by any act of their own, *without the consent of the government*, put off their allegiance and become aliens." (Italics added.)

Accord:

> *Murray, v. The Schooner Charming Betsy*, 2 Cranch. (U. S.) 64; 120.

Cf. Dawson's Lessee v. Godfrey, 4 Cranch. (U. S.) 321, 323:

> "(A) man can never put off his allegiance, or be deprived of the benefits of it but for a crime."

This is consistent with what the text writers have said on the subject.

In Getty's *The Law of Citizenship in the United States* (Univ. of Chicago Press, 1934), at page 160, this explanation is made:

> ". . . The right of an individual to terminate has native allegiance without the consent of his native country has been the subject of prolonged controversy and disagreement among the states of the world. International law recognizes that each state decides for itself whether or not expatriation is permissible. At present there seems to be no agreement as to the existence of a 'right of expatriation.' Some states have indicated a recognition of the doctrine of voluntary expatriation under certain conditions, as specified in bilateral treaties. Other states recognize the right unconditionally, while still others do not permit the expatriation of their citizens except by special consent . . ."

Dutcher in his article, *The Right of Expatriation,* 11 A. L. R. 447, 474, exhaustively reviews the subject and says:

> "The whole body of Federal law . . . announces with greater or less distinctness that a citizen of the United States cannot absolve himself from his allegiance thereto without some law of the United States permitting him so to do. Nor does the act of 1868 change the rule."

Swift, *A System of the Laws of the State of Connecticut* (Windham, Conn., 1795-96, Vol. I, p. 164), says:

> "Natural allegiance is the perpetual obligation to government binding on all mankind. It is a duty which they owe and which they can never renounce and disclaim, *without the consent and concurrence of the supreme power of the state.*" (Italics added.)

Blackstone put it this way:

> "Allegiance is the tie, or *ligamen*, which binds the subject to the King, in return for that protection which the King affords the subject . . . .
>
> ". . . (T)his natural *allegiance* . . . . *cannot be divested without the concurrent act of that prince to whom it was first due.*" (Second italics added.) (1 Blackstone, Commentaries, 367 *et seq.*)

Hence, it became necessary for Congress in 1868 to pass legislation giving such consent. And it did so, in eloquent language. (R. S. 1999; 8 U. S. C. (1946 Ed.) 800.) But even today (8 U. S. C. 1483), Congress has withheld consent to expatriation in certain cases. (*Cf. In re Grant*, 289 Fed. 814 (D. C. S. D. Cal., 1923; *United States v. Kuzcabara*, 56 F. Supp. 716 (D. C. N. D. Cal., 1944).)

One of the most recent examples of the necessity for governmental consent before a citizen can throw off the mantle of citizenship occurred also during World War II when Congress enacted 8 U. S. C. 801(i) (c. 368, Sec. 1, 58 Stat. 677) (now 8 U. S. C. 1481(a)(7)) with reference to the American-born Japanese who had been evacuated from the Pacific Coast and were held in camps by the United States Government. An account of this is set out in *Acheson v. Murakami*, 176 F. 2d 953, 962 (C. C. A. 9, 1949). (Finding 19).

Also demonstrating the necessity for the consent of the sovereign is *Kawakita v. United States*, 343 U. S. 717 where, in defense to a charge of treason, the defendant contended that he had exercised his "natural and inherent right" to expatriate. This contention was rejected.

If, then, a citizen cannot expatriate himself without the consent of the sovereign, the Sovereign cannot, especially because of the constitutional root of native born American citizenship, yank off the mantle from the citizen without his consent, voluntarily entered into with notice of the consequences. United States citizenship is a two-way highway, not a one-way street. Neither the Government may impose its loss nor may the citizen shed it without consent of the other. This is not new doctrine. As seen, it was recognized as early as Blackstone's time. And see Chief Justice Parsons in *Ainslee v. Martin*, 9 Mass. 454 (1813):

> "Protection and allegiance are reciprocal. The sovereign cannot refuse his protection to any subject, *nor discharge him from his allegiance against his consent*; and he will remain a subject, unless disfranchised as a punishment for some crime." (Italics added.)

It is, of course, accepted law that a person may give up, or "waive" constitutional rights. We concede that the right of citizenship granted and guaranteed by the Fourteenth Amendment would be among those constitutional rights which could be waived.[31] Else, 8 U. S. C. 800 would be meaningless. But it is equally accepted law that such waivers are not to be lightly implied and that before a waiver will be decreed, there must be the exercise of a free and intelligent choice[32] of at least the magnitude that is required, for example, for a waiver

---

[31] "Expatriation is the voluntary *renunciation or abandonment* of nationality and allegiance." *Perkins v. Elg*, 307 U. S. 325, 334. (Italics added.)

[32] *Cf.* the same rule even when one is *applying* for citizenship. *Moser v. United States*, 341 U. S. 41.

of the right of counsel,[33] or the right to a jury trial,[34] or the right to freedom from unreasonable search and seizure,[35] or the privilege against self-incrimination.[36] Were it otherwise, Congress would then be taking away *without the consent of the citizen* a right guaranteed him by the Constitution. Congress can no more do this in regard to citizenship than it can say that a man waives the right to counsel because he voluntarily pleads guilty when he does not know of the right to counsel in the first place (*Rice v. Olson*, 324 U. S. 786).

In other words, because Congress had the right to and did recognize the right of a citizen to give up his citizenship when he *wanted* so to do, *i.e.*, recognized the "right of expatriation," it had no power to twist that right into a liability and *impose* expatriation where the citizen did not want to give up his birthright.

(3)

CONGRESS HAS HERE EXCEEDED ITS POWER.

Similar legislation (8 U. S. C. 801(e)) to and that involved here was declared unconstitutional by the United States District Court for the District of Hawaii in *Okimura v. Acheson*, 99 F. Supp. 587 and *Murata v. Acheson*, 99 F. Supp. 591. Direct appeals were taken to this Court by the Government. This Court did not pass

---

[33] *Johnson v. Zerbst*, 304 U. S. 459, 464; *Glasser v. United States*, 315 U. S. 60, 70; *Gibbs v. Burke*, 337 U. S. 773, 780; *Uveges v. Pa.*, 335 U. S. 437, 441.

[34] *Patton v. United States*, 281 U. S. 276, 312; *Hodges v. Easton*, 106 U. S. 408; *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389, 393.

[35] *Johnson v. United States*, 333 U. S. 10, 13; *Amos v. United States*, 255 U. S. 313; *United States v. Di Re*, 332 U. S. 581.

[36] *Smith v. United States*, 337 U. S. 137, 150; *Quinn v. United States*, 349 U. S. 155.

on the issue but remanded the cases to the District Court for specific findings as to the circumstances attending the military service and voting involved (342 U. S. 899 and 900). On remand, the court made the required findings and still held the sections unconstitutional (*Okimura v. Acheson*, 111 F. Supp. 303; *Murata v. Acheson*, 111 F. Supp. 306). That court adhered to these decisions in six later cases.[87] The Government pursued appeals in none of these cases. In the light of this fact, the *Okimura* and *Murata* cases take on additional stature.

In the second *Okimura* case (111 F. Supp. 303), the court pointed out that it adhered to the rationale presented in the first case (99 F. Supp. 587). In that first case the court had said (99 F. Supp. at 589, 590):

> "May Congress divest a native born citizen of his birthright?
>
> ". . .
>
> "The point under discussion does not involve the unquestioned power of Congress to enact naturalization laws and to condition the retention of the status of citizenship so acquired. . . .
>
> ". . .
>
> "Too, it may be granted that a native citizen may lost that status by naturalization in a foreign country if the American national complies with the formalities with a specific, as distinguished from constructive, intention to cast off his United States citizenship.
>
> "Our concern is, rather, where in the Constitution is to be found any grant of power—specific or rea-

---

[87] *Terada v. Dulles*, 121 F. Supp. 6; *Uesu v. Dulles*, No. 1251; *Kikkawa v. Dulles*, No. 1256; *Hisamoto v. Dulles*, No. 1318; *Tamada v. Dulles*, 1263 and *Imaeda v. Dulles*, No. 1240 (the latter holding § 801(d) also invalid).

sonably implied by which Congress is authorized to divest an American born citizen of his nationality, because, having also Japanese nationality, he served in the Japanese Army or voted in an election in Japan? ____.

"It is the view of this Court that while the Constitution gives the Congress plenary power over citizenship by *naturalization*, it leaves the Congress no power whatsoever to interfere with American citizenship by *birth*.

"The leading case on this subject is United States v. Wong Kim Ark, 1898, 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890. While some of its teachings seems to have been occasionally forgotten or whittled down in recent years, it has never been overruled.

". . . .

"Section 800 of Title 8, United States Code Annotated, deals eloquently with the 'right' of expatriation; yet Section 801, applicable alike to native and naturalized citizens, attempts to spell out some ways in which that 'right' may become a liability.

"Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated. Congress has been given control over only one means of *creating* United States citizenship, namely by naturalization. It has the power to create and to condition that grant of citizenship; but is wholly devoid of any power to destroy cititzenship by birth."[38]

[38] By footnote 14, p. 500, the court made this significant statement:

"This Court is aware that there have been authoritative intimations to the contrary. See Mackenzie v. Hare, 239 U. S. 299, 311, 312, 36 S. Ct. 106, 60 L. Ed. 297; Perkins v. Elg, 307 U. S. 325, 329, 59 S. Ct. 884, 83 L. Ed. 1320; and Kawakita v. United States, 9 Cir., 1951, 190 F. 2d 506. But only in the Mackenzie case was the precise Constitutional question here involved squarely presented, and there under vastly different facts."

We submit that this reasoning represents the correct law. We have previously called attention to the *Wong Kim Ark* case where this Court said (169 U. S. at 703):

> "The 14th Amendment, while it leaves the power of Congress where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right of citizenship."

Moreover, a comparison between the language of the Constitution and the statute in question immediately demonstrates the patent invalidity of 8 U. S. C. 801(e). Thus:

U. S. Constitution 14th Amendment	*8 U. S. C. 801*
"All persons born or naturalized in the United States . . . are citizens of the United States. . . ."	"A person who is a national of the United States shall lose his nationality by . . ."

Nor does the declaration of Congress in 8 U. S. C. 800 change the situation. Regardless of what may be the rule where an American citizen actually *renounces* his citizenship, there is no basis for saying that Congress has the right to deprive him of his citizenship by the doing of acts other than actual renunciation, simply because Congress does not like him. The Constitution gives Congress no such right; that body cannot, by a declaration, clothe itself with such power.

The attempt by Congress to say that a person as to whom the Constitution says is a citizen, is not a citizen, is no more valid than would be efforts by Congress to undo any other provision of the Constitution. A few

examples, by way of rhetorical questions, will demonstrate the lack of power in Congress to so do:

1. Article I, Section 1, says that Congress shall consist of a Senate and a House of Representatives. May Congress decree that hereafter Congress shall consist of only a Senate?

2. Article I, Section 2, subsection 1, provides that members of the House of Representatives shall be chosen every second year. May Congress provide that hereafter members of the House shall be elected every third year?

3. Article I, Section 2, subsection 4, provides that where there is a vacancy in the House of Representatives from any state, the executive of that state shall fill the vacancy. May Congress provide that in such an instance the executive of that state shall not have the right but that Congress itself shall fill the vacancy?

4. Article I, Section 3, subsection 6, provides that the Senate shall have the sole power to try all impeachments. May Congress provide that the power to try impeachments shall henceforth be given to the House?

5. Article I, Section 3, subsection 7, provides that the judgment in impeachment shall extend only to removal from office and disqualification. May Congress enact that a judgment of impeachment may provide for sending the officer to jail?

6. Article I, Section 6, subsection 1, provides that a Senator or Representative for a speech or debate in either house shall not be questioned in any other place. May Congress provide that a Representative could be called to answer for a speech in the House before a Federal Grand Jury?

7. Article II, Section 1, subsection 1, provides that the President shall hold office for four years. May Congress provide that henceforth he shall only hold office for three years?

8. Article II, Section 2, Clause 1, provides, *inter alia*, that the President shall be the Commander-in-Chief of the Army and Navy, and that he shall have the power to grant pardons save in cases of impeachment. May Congress provide that he shall lose his command or his power to pardon if he engages in acts of which Congress disapproves?

9. Article III, Section 1, provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may establish. May Congress provide that the Supreme Court shall no longer have judicial power if it acts in a manner displeasing to Congress?

10. Article III, Section 3, Clause 1, provides that Congress may admit new states to the Union. May Congress provide that a state once admitted into the union can be ousted therefrom?

11. Article VI, Section 3, provides that no religious test shall be required as a qualification for an office of public trust. May Congress provide that such a qualification be required?

12. The Third Amendment provides that no soldier shall, in time of peace, be quartered in any house without the consent of the owner. May Congress provide that, in time of peace, soldiers may be quartered in a house without the owner's consent?

13. The Seventeenth Amendment provides that each state shall have two Senators. May Congress provide that a particular bad acting state shall have one or no Senators?

Further examples could, of course, be cited. The point is that citizenship is a specific right which the Constitution and not Congress gives. How, then, can Congress undo what the Constitution does?

Moreover, if Congress can strip away citizenship from persons constitutionally endowed with that status, why cannot it by similar legislation take away lesser rights which go to make up that bundle which we call American Citizenship, such as: the right by trial by jury, to be represented by counsel, to freedom of speech, etc. A familiar maxim is that the greater includes the lesser. Therefore, if Congress can take away the whole of citizenship, it should logically follow that it can take away any part thereof.[39] We believe Congress has no power in either instance.

We submit that in enacting "provisions for *compulsory* expatriation"[40] (italics added) absent consent, Congress has exceeded its delegated powers.

---

[39] The fact that these rights may also belong to aliens does not detract from the point. They certainly belong to citizens. See *Galvan v. Press*, 347 U. S. 522, for an example of where aliens have, if anything, less rights than citizens.

[40] The self contradicting words are those of the Government in its brief (p. 49) before this Court in the *Gonzales* case.

Conclusion.

The judgment of the court below should be reversed and petitioner declared to be a national and citizen of the United States.

Respectfully submitted,

A. L. Wirin,

Fred Okrand,

Attorneys for Petitioner.

APPENDIX.

Extracts From and or Comments on Documents Lodged With the Clerk of This Court in Aid of the Court's Taking Judicial Notice of Conditions in Japan at the Time Involved in This Case.

"For a long time the average citizen's reaction to the police has been one of extreme fear." (SCAP, *Summation No. 3*, Dec. 1945.)

"Free thought and free expression have been practically unknown in Japan. The police have occupied a dominant control over all phases of Japanese life. In addition to the regular police employed in maintaining law and order, Japan had an extensive network of secret police (Kempei Tei) and 'thought police.' The former possessed army authority and the latter authority of the Peace Preservation Act of 1941 and similar enactment on 'thought control.' Together they had been given unlimited power to deal with any signs of unrest or dissatisfaction. Thus the emergence (end of p. 36) of democratic groups was subjected immediately to ruthless terrorization and brutality. The press and radio have served as the mouthpiece of government policy." (SCAP, *Summation No. 1*, Sept., Oct., 1946, pp. 36-37.)

"Free thought and speech were completely suppressed by the special types of Japanese police. Ruthless methods prevented the emergence of authentic democratic groups." (*Ibid.*: 33.)

"The Japanese theatre was in a condition of stagnation. Expression of new ideas was not permitted and plays were either propagandistic or escapist in nature. Troupes touring the Country presented nothing but obviously official materials.". (*Ibid.*, 148.)

"In the course of 20 years, Japanese militarists had constructed effective machinery for controlling the speech, thoughts, and movements of the people. This was accomplished through legislation, the police, censorship regulations, centralized control over newsprint and ownership of radio broadcasting facilities." (*Ibid.*, 163.)

"In the later years, preceding and during the war, the most vicious regimentation of the people came through the police force of Japan, which was also under the Home Ministry. By both legal and extra-legal methods the police eliminated dissident elements, frequently throwing people in jail who were considered troublesome and keeping them there for years without lodging specific charges." (SCAP, *Two Years of Occupation*, p. 14.)

"Most objectionable of these were, of course, the supervision and restriction of the people in the exercise of their fundamental rights under the so-called Peace Preservation Law. For this purpose there were 'Thought Police' or 'Special Higher Police' units in the municipalities, prefectures and in the Home Ministry. The activities of these bodies were supplemented by the 'Protection and Surveillance Commission' and 'Protection and Surveillance Stations' in the procuratorial system under the Ministry of Justice." (SCAP, *A Brief Progress Report on the Political Reorientation of Japan*, p. 7.)

"(Nisei, whether in Japan or long or short time) were under surveillance (by the police) by reason of their identity and association." (Togosaki Deposition, p. 10.)

"Conscription or government notification is final to which no one can appeal. There is no process, no media, no channel by which an appeal can be made." (*Ibid.*, pp. 26-27.)

"There was fear . . among (the draftees) that they would be shot or killed . . . if they didn't obey summons." (*Ibid.*, p. 27.)

The court below commented on several features from the Murayama deposition in *Fukumoto v. Dulles*, 216 F. 2d at 555.

After the Manchurian incident, no one refused military conscription. (Matsuki Deposition, pp. 15, 17.) One couldn't refuse conscription. (*Ibid.* pp. 18, 21.)